IN THE HIGH COURT OF AUSTRALIA
SYDNEY OFFICE OF THE REGISTRY

No S145 of 2017

PROBUILD CONSTRUCTIONS (AUST) PTY LTD
Appellant

SHADE SYSTEMS PTY LTD
First Respondent

DORON RIVLIN
Second Respondent

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APPELLANT'S SUBMISSIONS

PART I – PUBLICATION

1. These submissions are in a form suitable for publication on the internet.

PART II – ISSUES

2. Is the power of the NSW Supreme Court to make orders in the nature of certiorari for error of law on the face of the record ousted by the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**SOP Act** or **NSW SOP Act**) absent express words to that effect?

PART III – SECTION 78B NOTICES

3. The appellant has considered whether any notices should be given in compliance with s 78B
20 of the *Judiciary Act 1903* (Cth). It considers that no such notices are required.

PART IV – CITATIONS

4. The medium neutral citations for the reasons for judgment of the NSW Court of Appeal and that of the primary judge are [2016] NSWCA 379 and [2016] NSWSC 770 respectively.

PART V – FACTS

5. On 15 February 2016, the second respondent (**Adjudicator**) made a determination (**Determination**) under s 22(1) of the SOP Act.

6. There is no dispute that the Determination was made on the basis of errors of law that appear on the face of the record.[1]

7. On 15 June 2016, the primary judge (Emmett AJA) made an order in the nature of certiorari
30 quashing the Determination for error of law on the face of the record. His Honour held that there was no "*clear indication or implication*" to be found in the SOP Act to the effect that the power to quash for error of law on the face of the record is intended to be excluded.[2]

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[1] See Basten JA at [25].

[2] Emmett AJA at [74].

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8. On 23 December 2016, the NSW Court of Appeal allowed an appeal from the primary judge's decision. Justice Basten (with whom the remainder of the Court of Appeal relevantly agreed) accepted that the SOP Act contains "*no explicit privative clause*"[3] but held that the SOP Act should be understood as precluding judicial review for error of law on the face of the record because the contrary conclusion would "*undermine*" what his Honour regarded as "*the underlying purposes of the [SOP] Act*".[4]

9. On 8 February 2017, the Full Court of the Supreme Court of South Australia in *Maxcon Constructions v Vadasz (No 2)* [2017] SASCFC 2 (***Maxcon***) expressed the opposite view in relation to the South Australian counterpart to the NSW SOP Act (**SA SOP Act**).[5] While the Full Court did not find Basten JA's reasoning below to be persuasive, it nevertheless considered itself bound to follow that reasoning by reason of the decision of this Court in *Farah Constructions v Say-Dee* (2007) 230 CLR 89.[6]

PART VI – ARGUMENT

Overview

10. The Appellant contends that the reasoning of the Full Court of the South Australian Supreme Court in *Maxcon* at [149]-[186] and that of the primary judge at [55]-[74] is to be preferred to that of the NSW Court of Appeal below.

11. The Full Court in *Maxcon* and the primary judge were correct to identify and apply the established doctrine in this Court to the effect that judicial review (including review for error of law on the face of the record) will only be regarded as ousted where a statute contains clear words to that effect.

12. Contrary to Basten JA's reasoning below, speculation that judicial review might "*undermine*" the "*underlying purposes*" of a statute does not provide a sufficient basis for concluding that judicial review is ousted.

13. There are no clear words in the SOP Act to the effect that the power to quash for error of law on the face of the record is ousted in relation to determinations under that Act. That being so, the NSW Court of Appeal should have held (as the primary judge did and as the Full Court in *Maxcon* would have held had it considered itself at liberty to do so) that the Supreme Court's judicial review powers remain relevantly intact.

14. The appeal should be allowed and the NSW Court of Appeal's substantive orders should be set aside. This would have the effect of restoring the primary judge's order quashing the Determination for error of law on the face of the record.

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[3] Basten JA at [32].

[4] Basten JA at [85].

[5] *Maxcon* at [149]-[186] per Blue J (with whom Lovell and Hinton JJ relevantly agreed).

[6] *Maxcon* at [209].

The power to quash for error of law on the face of the record

15. The power to quash decisions for error on the face of the record is one of considerable antiquity.

16. The power is capable of being traced to as early as the thirteenth century in which writs of certiorari were issued to effect what one author has described as "*the medieval equivalent of sending for the file*"[7].

17. Where there was a complaint of judicial error, complainants came to be required to "*assign errors*" – that is, to identify the places in the record where it was said that the court below had gone wrong.[8] Writs of this kind came to be known as writs of error[9] and lay only for errors apparent on the face of the record.[10]

18. Writs of error did, however, have their limitations. For example, they would not lie to quash convictions and orders made by justices of the peace in summary proceedings[11] and would not lie from courts without a formal record.[12]

19. Those limitations appear to have led to the development in the seventeenth century of a specific species of certiorari "*to quash*" (perhaps by way of analogy from proceedings by writ of error).[13] By 1700, the Court of Kings Bench (Holt CJ) declared that:

> It is a consequence of all jurisdictions to have their proceedings returned here [to the Court of Kings Bench] by certiorari to be examined here. ... Where any court is erected by statute, a certiorari lies to it.[14]

20. The power of the Court of Kings Bench to issue certiorari was inherited by the NSW Supreme Court when it was established in 1824 by the Third Charter of Justice.[15] The power was subsequently confirmed by the enactment of s 69(1) of the *Supreme Court Act 1970* (NSW) (**SCA**) in 1970 and confirmed again in 1996 when the SCA was amended, in the wake of this Court's decision in *Craig v South Australia* (1995) 184 CLR 163, to "*declare[ ] that the jurisdiction of the [Supreme Court] ... includes the jurisdiction to quash the ultimate determination of a court or tribunal in any proceedings if that determination has been made on the basis of an error of law that appears on the face of the record*".[16]

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[7] Milsom, *Historical Foundations of the Common Law* (2nd ed, 1981) (**Milsom**) at 56.

[8] Milsom at 56-57. See also Holdsworth, *A History of English Law* (7th ed, 1956) (**Holdsworth**) at 214.

[9] Milsom at 58; Henderson, *Foundations of English Administrative Law: Certiorari and Mandamus in the Seventeenth Century* (1963) (**Henderson**) at 84.

[10] Blackstone, *Commentaries on the Laws of England* (1st ed) (**Blackstone**) at Bk III, 405; Henderson at 88; Milsom at 57; Holdsworth at 223-224.

[11] Lord Woolf et al, *De Smith's Judicial Review* (7th ed, 2016) (**De Smith**) at 863. See also Henderson at 94.

[12] Blackstone at Bk III, 405; Henderson at 84. Writs of false judgment instead lay to courts not of record.

[13] Gordon, 'Certiorari and the Revival of Error in Fact', (1926) 42 LQR 521 at 524 (quoted by Hayne J in *Re McBain; ex parte Catholic Bishops Conference* (2002) 209 CLR 372 at 463 [257]); Henderson at 95ff.

[14] *Groenvelt v Burwell* (1700) 1 Ld Raym 454 at 469.

[15] That is the Letters Patent made on 13 October 1823 under the *New South Wales Act 1823* (Imp) 4 Geo IV, c 96 and proclaimed on 17 May 1824.

[16] See *Courts Legislation Amendment Act 1996* (NSW) Sch 1, cl 1.8 [8] and the associated explanatory note.

The presumption against ouster of certiorari absent clear words

21. With this venerable history in mind, it is unsurprising that courts have required clear words before interpreting a statute as ousting the power to issue (or order) certiorari.

22. An early example of such an approach to statutory construction may be found in the seventeenth century case of *R v Plowright* (1686) 3 Mod 94; 87 ER 60. In that decision, it was held that a statute which provided that certain disputes would be "*finally determined by a justice of the peace*" was not sufficient to oust the power to remove a justice's determination into the Court of King's Bench by a writ of certiorari and to quash it.

23. To similar effect is this Court's decision in *Hockey v Yelland* (1984) 157 CLR 124. That decision concerned a Queensland statute which declared that certain decisions of a Medical Board "*shall be final and conclusive*" with the person affected having no right to have any matters "*heard and determined ... by way of appeal or otherwise, by any Court or judicial tribunal whatsoever*".

24. This Court held that those words were insufficient to oust the power of the Queensland Supreme Court to issue certiorari for error of law on the face of the record. Instead, Gibbs CJ (with whom Brennan and Dawson JJ agreed) opined that "*clear words*" were necessary to oust the power to quash a decision for error of law on the face of the record.[17] There are multiple decisions of this Court to like effect.[18]

25. There are no "*clear words*" in the NSW SOP Act to the effect that certiorari for error of law on the face of the record is excluded in relation to determinations under that Act.

26. Despite this, the NSW Court of Appeal below concluded that the power to quash should be regarded as ousted by the SOP Act other than for jurisdictional error. That conclusion was said to be available because (so it was said) "*[t]he contrary conclusion would undermine the underlying purposes of the [SOP] Act*"[19].

27. In proceeding in this fashion, the NSW Court of Appeal applied the wrong test. In accordance with established authority, that Court should have directed its attention to whether there were clear words ousting the NSW Supreme Court's power to quash for error of law on the face of the record.

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[17] *Hockey v Yelland* (1984) 157 CLR 124 at 130. See also Wilson J at 142.

[18] *The Owners of the Ship "Shin Kobe Maru" v Empire Shipping Company* (1994) 181 CLR 404 at 421; *Darling Casino Ltd v NSW Casino Control Authority* (1997) 191 CLR 602 at 633; *Shergold v Tanner* (2002) 209 CLR 126 at 136 [34]; *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 505 [72]. See also *Jacobs v Brett* (1875) LR 20 Eq 1 at 6-7; *Re Gilmore's Application* [1957] 1 All ER 796 at 801 per Denning LJ and *R (on the application of Sivasubramaniam) v Wandsworth Country Court* [2002] EWCA Civ 1738 at [44] in which Lord Phillips MR stated that "*[t]he weight of authority makes it impossible to accept that the jurisdiction to subject a decision to judicial review can be removed by statutory implication*".

[19] Basten JA at [85].

28. In addition to being required by authority, such an approach to statutory construction is correct in principle because it avoids inadvertent restrictions on the legal machinery available to ensure that public power is exercised according to law.

29. As Laws LJ put it in R *(Cart) v Upper Tribunal* [2011] QB 120 at 137 [34]:

> The court's ingrained reluctance to countenance the statutory exclusion of judicial review has its genesis in the fact that judicial review is the principal engine of the rule of law. 'Judicial review is the exercise of the court's inherent power at common law to determine whether action is lawful or not; in a word to uphold the rule of law'.

30. That being so, courts should not "*too readily surrender the beneficial facility of judicial review which is the ultimate machinery to protect the rule of law*".[20]

31. Insisting on clear words before interpreting a statute as ousting certiorari for error of law on the face of the record also has the virtue of preventing courts from being drawn into qualitative questions which are best left to policy-makers. In particular, such an approach avoids courts having to assess whether the "*underlying purposes*" of a statute should, in a particular case, trump the public interest in nullifying decisions which are manifestly erroneous in law.

32. Had the NSW Court of Appeal considered whether there were clear words in the SOP Act ousting the power to review for error of law on the face of the record, it would have been bound to conclude (as the primary judge did and as the Full Court in *Maxcon* did in relation to the SA SOP Act) that there were no such words. This Court should conclude likewise and hold that the SOP Act does not exclude the power to quash for error of law on the face of the record.

33. If that be accepted, it follows that the primary judge did not err in making an order in the nature of certiorari quashing the Determination (there being no dispute that the Determination was made on the basis of an error of law which appears on the face of the relevant record). The NSW Court of Appeal's decision to the contrary should be reversed.

Certiorari for manifest error of law would not "*undermine the underlying purposes of the [SOP] Act*"

34. Even if the NSW Court of Appeal was correct to proceed on the basis that judicial review could be regarded as ousted where such review might "*undermine the underlying purposes*" of an Act, the Court of Appeal was wrong to conclude that the "*underlying purposes of the [SOP] Act*" would be "*undermined*" by the continued existence of the NSW Supreme Court's ordinary powers to quash manifestly erroneous decisions of inferior courts and tribunals.

35. It should not be supposed that one of the purposes of the NSW Parliament in enacting the SOP Act was to require courts to recognise and enforce extrajudicial determinations which are manifestly erroneous in law.

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[20] *Osmond v Public Service Board* [1984] 32 NSWLR 447 at 451 per Kirby P.

36. On the contrary, the SOP Act contemplates that adjudicator's determinations will be rendered according to law.

37. In this regard, s 9 of the SOP Act commands that construction work "*is to be*" valued by an adjudicator[21] according to a legal standard – either "*in accordance with the terms of the [construction] contract*" or in accordance with the statutory measure prescribed by ss 9(b) and 10(1)(b) or 10(2)(b) of the Act – not, for example, *ex aequo et bono*. This tends against a construction of the SOP Act which requires courts to overlook errors of law which they would ordinarily be able to review.

38. The importance of preserving the discretion to intervene in cases of manifest error of law is particularly evident when it is recalled that there is no limit on the amount which may be claimed in a payment claim under the SOP Act. For example, there was a payment claim made under the Queensland equivalent of the NSW SOP Act in the 2016 financial year which claimed almost a billion dollars.[22]

39. As the Full Court observed in *Maxcon*:

> The Act applies to virtually all contracts for building work except domestic building work. This includes large contracts involving tens, hundreds or thousands of millions of dollars. Progress payments under such contracts will involve amounts of this order, such that the applicant or the respondent may suffer very substantial prejudice if an adjudicator makes an error of law on the face of the record resulting in a wrong determination ... [that] cannot practically be remedied on the ultimate determination of the parties' rights due to insolvency of one party.
>
> It is important to note that a claimant (as much as a respondent) might seek to challenge an adjudication determination. Any legislative exclusion of judicial review rights might potentially prejudice a claimant as much as a respondent.[23]

40. Absent strong grounds, it is not to be inferred that the NSW Parliament intended to remove the Supreme Court's longstanding power to grant a remedy which could be used to avoid "*very substantial prejudice*" of the kind adverted to in *Maxcon*.

41. Interpreting the NSW SOP Act as not intending to oust the power to quash for manifest error of law is also supported by recourse to principles of statutory interpretation pertaining to implied repeal.

42. As already observed,[24] the NSW Parliament confirmed the continued existence of the NSW Supreme Court's power to order certiorari in 1970 and again in 1996. On the latter occasion, the SCA was amended specifically to "*declare[ ]*" that the power to issue certiorari includes a power to quash for error of law on the face of the record.

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[21] See *Southern Han Breakfast Point v Lewence Construction* (2016) 91 ALJR 233 at 244 [59] in which this Court held that s 9 "*anticipates*" the procedure for recovery that culminates in a determination by an Adjudicator.

[22] Queensland Building and Construction Commission, *Monthly Adjudication Statistics – September 2016* at 3.

[23] *Maxcon* at [183]-[184].

[24] See paragraph 20 above.

43. Such a declaration was thought to be desirable with a view to "*restor[ing] the Supreme Court's jurisdiction to what it was before Craig v State of South Australia [(1995) 184 CLR 163]*" which the NSW Parliament regarded as undesirably "*limit[ing] the jurisdiction of the Supreme Court to grant any relief or remedy by way of an order in the nature of a writ of certiorari*".[25]

44. This "*declaration*" having been made in 1996, a "*very strong presumption*" arises that the NSW Parliament "*did not intend to contradict itself*" by passing the SOP Act in 1999 but instead "*intended that both Acts should operate*".[26]

45. There is nothing in the reasoning of the NSW Court of Appeal or otherwise which provides a sufficient basis for concluding that the SOP Act discloses the "*very strong grounds*"[27] necessary to defeat that presumption.

46. The Court of Appeal's reasons identify three principal[28] factors said to support a conclusion that the SOP Act ousts the power to quash for manifest error of law:

(a) the fact that the SOP Act provides what Basten JA described as a "*coherent, expeditious and self-contained scheme for resolving disputes with respect to payment claims*"[29];

(b) the fact that the SOP Act does not include a statutory appeal for error of law;[30] and

(c) the fact that a person who pays money pursuant to an erroneous SOP Act determination is not necessarily "*left without a legal remedy*" because a court might later order restitution of some or all of that amount.[31]

47. These asserted factors mirror the three arguments which were advanced in *Maxcon* in support of a submission that the SA SOP Act excluded review for error of law on the face of the record.[32] All of those arguments were correctly rejected by the South Australian Full Court.

48. As to the **first** of the identified factors/arguments, although it may be accepted that the SOP Act is intended to create a scheme for the expeditious determination of disputes with respect to payment claims by extrajudicial adjudicators, it does not follow from that that the NSW Parliament must have intended that manifestly erroneous determinations would be required to be recognised and enforced notwithstanding the existence of the Supreme Court's traditional supervisory jurisdiction.

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[25] See explanatory note to *Courts Legislation Amendment Act 1996* (NSW) Sch 1, cl 1.8 [8].

[26] *Butler v Attorney-General (Vic)* (1961) 106 CLR 268 at 276 (cited in *Saraswati v The Queen* (1991) 172 CLR 1 at 17). See also *Ferdinands v Commissioner* (2006) 225 CLR 130 at 134 [4], 138 [18] and *Commissioner v Eaton* (2013) 252 CLR 1 at 33 [98].

[27] *Saraswati v The Queen* (1991) 172 CLR 1 at 17.

[28] Ignoring for present purposes the "*relatively weak*" factor of s 25(4) of the SOP Act (see Basten JA at [55]) and the "*contestable*" factor of s 27 of that Act (see Basten JA at [64]).

[29] Basten JA at [59], [67].

[30] See Basten JA at [48].

[31] Basten JA at [61], [67].

[32] See *Maxcon* at [179].

49. There is nothing "*[in]coherent*" in providing an expeditious extrajudicial procedure for determining disputes of particular kinds whilst acknowledging that court intervention may be permissible and appropriate in particular categories of cases.

50. In this regard, it should be observed that it was common ground below that the SOP Act does not – as a matter of construction[33] – purport to exclude certiorari on the ground of jurisdictional error. The NSW Court of Appeal (correctly) did not regard the availability of review on that ground as inconsistent with, or impliedly excluded by, the scheme for expeditious adjudication contemplated by the SOP Act.

51. There is no basis for reaching the opposite conclusion in relation to review on the ground of error of law on the face of the record. This is particularly so given that applications for judicial review for error of law on the face of the record are ordinarily capable of being dealt with at least as expeditiously as applications for review for jurisdictional error (given that, in the former class of applications, the court is limited to the formal record whereas, in the latter, evidence is admissible that strays beyond the record and which may require resolution of "*difficult factual issues*"[34]).

52. In addition, in considering the inferences as to Parliamentary intention which might be drawn from the "*expeditious procedure provided by the [SOP] Act*", it is necessary to consider the end to which that "*expeditious procedure*" is directed. As this Court observed in *Southern Han v Lewence* (2016) 91 ALJR 233 at 235 [4], the stated objective of the Bill which became the SOP Act was to "*stamp out the practice of developers and contractors delaying payment to subcontractors and suppliers*".

53. That object is not defeated by judicial review being available for non-jurisdictional error of error of law on the face of the record in the ordinary way.

54. Unlike a decision infected by jurisdictional error, a decision made on the basis of a non-jurisdictional error of law is valid and enforceable unless and until a court says otherwise.

55. Whilst it is true that a pending application for an order quashing a SOP Act determination for error of law on the face of the record may provide a basis for an interlocutory restraint on the enforcement of a SOP Act determination,[35] it can be expected that any application for such a restraint will be considered in light of the objects of the Act.[36]

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[33] Of course, if the SOP Act did purport to exclude the Supreme Court's power to review for jurisdictional error, it would be constitutionally invalid: *Kirk v Industrial Court* (2009) 239 CLR 531 at 581 [100].

[34] *Southern Han Breakfast Point Pty Ltd v Lewence Construction Pty Ltd* [2015] NSWSC 502 at [40] per Ball J (aff'd in *Southern Han Breakfast Point Pty Ltd (in liq) v Lewence Construction* (2016) 91 ALJR 233).

[35] See Basten JA at [67].

[36] See *Maxcon* at [180] to similar effect.

56. For example, an interlocutory restraint might only be granted on an undertaking to pay the adjudicated amount into Court.[37] Alternatively, an interlocutory restraint might be refused in a particular case with the result that the principal is required to make an expeditious payment to the builder and then seek restitutionary orders in the event that the application for judicial review is successful.

57. In this way, the statutory object of requiring prompt payment by developers and contractors can "*stand together*"[38] with the power to quash for error of law on the face of the record confirmed by the SCA.

58. As the Full Court correctly said in *Maxcon*, the legislature "*must be taken to have contemplated that adjudication determinations can be challenged in judicial review proceedings*" with that legislature leaving to the courts "*the responsibility of controlling judicial review proceedings*" with a view to minimising "*delay and expense and potential prejudice*".[39]

59. As for the **second** of the factors/arguments identified above (absence of statutory appeal for error of law), that factor does not demonstrate a legislative intention inconsistent with the availability of review for manifest error of law. As was correctly observed in *Maxcon*:

> A right of appeal is frequently not conferred in respect of administrative decisions or decisions of special tribunals and this is not generally regarded as impliedly excluding judicial review on the ground of error of law on the face of the record.[40]

Consistent with this, in *Hockey v Yelland* (1984) 157 CLR 124 at 131, this Court did not consider the express exclusion of a right of appeal as impliedly "*tak[ing] away from the [Supreme] Court its power to issue certiorari for error of law on the face of the record*".

60. As for the **final** factor/argument identified above, although Basten JA was correct to observe that s 32 of the SOP Act preserves the ability of a court to "*order restitution where it was determined that a progress payment had been required in an amount not properly payable under the contract*",[41] that fact does not support a conclusion that the power to review for error of law on the face of the record was intended to be ousted.

61. The fact that a particular right is preserved does not (without more) logically support a conclusion that another right is intended to be abrogated.

62. Recourse to s 32 of the SOP Act also highlights an inherent tension in the NSW Court of Appeal's approach.

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[37] This is a common condition where an interlocutory restraint is sought in aid of proceedings to quash a SOP Act determination as it secures prompt payment to the builder in the event that the challenge to the determination is dismissed: see, eg, *Filadelfia Projects v EntirITy Building Services* [2010] NSWSC 473 at [11].

[38] See the classic formulation of the "*rule*" for implied repeal in *Kutner v Phillips* [1891] 2 QB 267 at 272. See also, eg, *Union Steamship Co v Commonwealth* (1925) 36 CLR 130 at 156.

[39] *Maxcon* at [180].

[40] *Maxcon* at [182].

[41] See Basten JA at [60]-[62].

63. Before the Court of Appeal, there was no challenge to the primary judge's conclusion that the Determination was manifestly erroneous in law.[42]

64. Yet, on the Court of Appeal's approach, the manifestly erroneous Determination must be regarded as binding even though it requires payment of an amount which is "*not properly payable under the contract*" and which the first respondent is not entitled to retain due to the operation of s 32 of the SOP Act.

65. That is an absurd result which should not be regarded as mandated by the objects of the SOP Act. It is not an object of the SOP Act to require payment of amounts to which a person is, in law, manifestly not entitled to be paid.

10 66. The correct view is that the SOP Act does not, on its proper construction, prevent the Supreme Court from exercising its ordinary judicial review powers where an error of law appears on the face of the record.

Conclusion

67. There are no clear words or other proper grounds for concluding that the SOP Act ousts the power of the NSW Supreme Court to quash for error of law on the face of the record.

68. The NSW Court of Appeal erred in holding to the contrary.

69. The appeal should be allowed and the substantive orders of the Court of Appeal set aside.

PART VII – APPLICABLE STATUTORY PROVISIONS

70. The applicable statutory provisions are **annexed** hereto.

20 ## PART VIII – ORDERS SOUGHT

71. Appeal allowed.

72. Set aside orders 1 and 2 of the orders made by the Court of Appeal of the Supreme Court of New South Wales on 23 December 2016 (except insofar as those orders deal with the question of costs in the Equity Division of the Supreme Court of New South Wales) and in lieu thereof order that the appeal to the Court of Appeal is dismissed.

PART XI – TIME ESTIMATE

73. The Appellant estimates that it will require around 1.5 hours for the presentation of its oral argument.

16 June 2017

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[42] See Basten JA at [25].

ANNEXURE

Supreme Court Act 1970 **(NSW) (as presently in force)**

69 Proceedings in lieu of writs

(1) Where formerly:

(a) the Court had jurisdiction to grant any relief or remedy or do any other thing by way of writ, whether of prohibition, mandamus, certiorari or of any other description, or

(b) in any proceedings in the Court for any relief or remedy any writ might have issued out of the Court for the purpose of the commencement or conduct of the proceedings, or otherwise in relation to the proceedings, whether the writ might have issued pursuant to any rule or order of the Court or of course,

then, after the commencement of this Act:

(c) the Court shall continue to have jurisdiction to grant that relief or remedy or to do that thing; but

(d) shall not issue any such writ, and

(e) shall grant that relief or remedy or do that thing by way of judgment or order under this Act and the rules, and

(f) proceedings for that relief or remedy or for the doing of that thing shall be in accordance with this Act and the rules.

(2) Subject to the rules, this section does not apply to:

(a) the writ of habeas corpus ad subjiciendum,

(b) any writ of execution for the enforcement of a judgment or order of the Court, or

(c) any writ in aid of any such writ of execution.

(3) It is declared that the jurisdiction of the Court to grant any relief or remedy in the nature of a writ of certiorari includes jurisdiction to quash the ultimate determination of a court or tribunal in any proceedings if that determination has been made on the basis of an error of law that appears on the face of the record of the proceedings.

(4) For the purposes of subsection (3), the face of the record includes the reasons expressed by the court or tribunal for its ultimate determination.

(5) Subsections (3) and (4) do not affect the operation of any legislative provision to the extent to which the provision is, according to common law principles and disregarding those subsections, effective to prevent the Court from exercising its powers to quash or otherwise review a decision.

Building and Construction Industry Security of Payment Act 1999 **(NSW)**
(as presently in force)

3 Object of Act

(1) The object of this Act is to ensure that any person who undertakes to carry out construction work (or who undertakes to supply related goods and services) under a construction contract is entitled to receive, and is able to recover progress payments in relation to the carrying out of that work and the supplying of those goods and services.

(2) The means by which this Act ensures that a person is entitled to receive a progress payment is by granting a statutory entitlement to such a payment regardless of whether the relevant construction contract makes provision for progress payments.

(3) The means by which this Act ensures that a person is able to recover a progress payment is by establishing a procedure that involves:

(a) the making of a payment claim by the person claiming payment, and

(b) the provision of a payment schedule by the person by whom the payment is payable, and

(c) the referral of any disputed claim to an adjudicator for determination, and

(d) the payment of the progress payment so determined.

(4) It is intended that this Act does not limit:

(a) any other entitlement that a claimant may have under a construction contract, or

(b) any other remedy that a claimant may have for recovering any such other entitlement.

[...]

7 Application of Act

(1) Subject to this section, this Act applies to any construction contract, whether written or oral, or partly written and partly oral, and so applies even if the contract is expressed to be governed by the law of a jurisdiction other than New South Wales.

[...]

8 Rights to progress payments

(1) On and from each reference date under a construction contract, a person:

(a) who has undertaken to carry out construction work under the contract, or

(b) who has undertaken to supply related goods and services under the contract,

is entitled to a progress payment.

(2) In this section, ***reference date***, in relation to a construction contract, means:

(a) a date determined by or in accordance with the terms of the contract as the date on which a claim for a progress payment may be made in relation to work carried out or undertaken to be carried out (or related goods and services supplied or undertaken to be supplied) under the contract, or

(b) if the contract makes no express provision with respect to the matter—the last day of the named month in which the construction work was first carried out (or the related goods and services were first supplied) under the contract and the last day of each subsequent named month.

9 Amount of progress payment

The amount of a progress payment to which a person is entitled in respect of a construction contract is to be:

(a) the amount calculated in accordance with the terms of the contract, or

(b) if the contract makes no express provision with respect to the matter, the amount calculated on the basis of the value of construction work carried out or undertaken to be carried out by the person (or of related goods and services supplied or undertaken to be supplied by the person) under the contract.

10 Valuation of construction work and related goods and services

(1) Construction work carried out or undertaken to be carried out under a construction contract is to be valued:

(a) in accordance with the terms of the contract, or

(b) if the contract makes no express provision with respect to the matter, having regard to:

(i) the contract price for the work, and

(ii) any other rates or prices set out in the contract, and

(iii) any variation agreed to by the parties to the contract by which the contract price, or any other rate or price set out in the contract, is to be adjusted by a specific amount, and

(iv) if any of the work is defective, the estimated cost of rectifying the defect.

(2) Related goods and services supplied or undertaken to be supplied under a construction contract are to be valued:

(a) in accordance with the terms of the contract, or

(b) if the contract makes no express provision with respect to the matter, having regard to:

(i) the contract price for the goods and services, and

(ii) any other rates or prices set out in the contract, and

(iii) any variation agreed to by the parties to the contract by which the contract price, or any other rate or price set out in the contract, is to be adjusted by a specific amount, and

(iv) if any of the goods are defective, the estimated cost of rectifying the defect,

and, in the case of materials and components that are to form part of any building, structure or work arising from construction work, on the basis that the only materials and components to be included in the valuation are those that have become (or, on payment, will become) the property of the party for whom construction work is being carried out.

13 Payment claims

(1) A person referred to in section 8 (1) who is or who claims to be entitled to a progress payment (the ***claimant***) may serve a payment claim on the person who, under the construction contract concerned, is or may be liable to make the payment.

[...]

14 Payment schedules

(1) A person on whom a payment claim is served (the ***respondent***) may reply to the claim by providing a payment schedule to the claimant.

[...]

17 Adjudication applications

(1) A claimant may apply for adjudication of a payment claim (an ***adjudication application***) if:

(a) the respondent provides a payment schedule under Division 1 but:

(i) the scheduled amount indicated in the payment schedule is less than the claimed amount indicated in the payment claim, or

(ii) the respondent fails to pay the whole or any part of the scheduled amount to the claimant by the due date for payment of the amount, or

(b) the respondent fails to provide a payment schedule to the claimant under Division 1 and fails to pay the whole or any part of the claimed amount by the due date for payment of the amount.

[...]

(3) An adjudication application:

(a) must be in writing, and

(b) must be made to an authorised nominating authority chosen by the claimant, and

(c) in the case of an application under subsection (1) (a) (i)—must be made within 10 business days after the claimant receives the payment schedule, and

(d) in the case of an application under subsection (1) (a) (ii)—must be made within 20 business days after the due date for payment, and

(e) in the case of an application under subsection (1) (b)—must be made within 10 business days after the end of the 5-day period referred to in subsection (2) (b), and

(f) must identify the payment claim and the payment schedule (if any) to which it relates, and

(g) must be accompanied by such application fee (if any) as may be determined by the authorised nominating authority, and

(h) may contain such submissions relevant to the application as the claimant chooses to include.

[...]

(6) It is the duty of the authorised nominating authority to which an adjudication application is made to refer the application to an adjudicator (being a person who is eligible to be an adjudicator as referred to in section 18) as soon as practicable.

19 Appointment of adjudicator

(1) If an authorised nominating authority refers an adjudication application to an adjudicator, the adjudicator may accept the adjudication application by causing notice of the acceptance to be served on the claimant and the respondent.

(2) On accepting an adjudication application, the adjudicator is taken to have been appointed to determine the application.

20 Adjudication responses

(1) Subject to subsection (2A), the respondent may lodge with the adjudicator a response to the claimant's adjudication application (the ***adjudication response***) at any time within:

(a) 5 business days after receiving a copy of the application, or

(b) 2 business days after receiving notice of an adjudicator's acceptance of the application,

whichever time expires later.

(2) The adjudication response:

(a) must be in writing, and

(b) must identify the adjudication application to which it relates, and

(c) may contain such submissions relevant to the response as the respondent chooses to include.

[...]

21 Adjudication procedures

(1) An adjudicator is not to determine an adjudication application until after the end of the period within which the respondent may lodge an adjudication response.

(2) An adjudicator is not to consider an adjudication response unless it was made before the end of the period within which the respondent may lodge such a response.

(3) Subject to subsections (1) and (2), an adjudicator is to determine an adjudication application as expeditiously as possible and, in any case:

(a) within 10 business days after the date on which the adjudicator notified the claimant and the respondent as to his or her acceptance of the application, or

(b) within such further time as the claimant and the respondent may agree.

[...]

22 Adjudicator's determination

(1) An adjudicator is to determine:

(a) the amount of the progress payment (if any) to be paid by the respondent to the claimant (the ***adjudicated amount***), and

(b) the date on which any such amount became or becomes payable, and

(c) the rate of interest payable on any such amount.

[...]

23 Respondent required to pay adjudicated amount

(1) In this section:

relevant date means:

(a) the date occurring 5 business days after the date on which the adjudicator's determination is served on the respondent concerned, or

(b) if the adjudicator determines a later date under section 22 (1) (b) – that later date.

(2) If an adjudicator determines that a respondent is required to pay an adjudicated amount, the respondent must pay that amount to the claimant on or before the relevant date.

24 Consequences of not paying claimant adjudicated amount

(1) If the respondent fails to pay the whole or any part of the adjudicated amount to the claimant in accordance with section 23, the claimant may:

(a) request the authorised nominating authority to whom the adjudication application was made to provide an adjudication certificate under this section, and

(b) serve notice on the respondent of the claimant's intention to suspend carrying out construction work (or to suspend supplying related goods and services) under the construction contract.

(2) A notice under subsection (1) (b) must state that it is made under this Act.

(3) An adjudication certificate must state that it is made under this Act and specify the following matters:

(a) the name of the claimant,

(b) the name of the respondent who is liable to pay the adjudicated amount,

(c) the adjudicated amount,

(d) the date on which payment of the adjudicated amount was due to be paid to the claimant.

(4) If any amount of interest that is due and payable on the adjudicated amount is not paid by the respondent, the claimant may request the authorised nominating authority to specify the amount of interest payable in the adjudication certificate. If it is specified in the adjudication certificate, any such amount is to be added to (and becomes part of) the adjudicated amount.

(5) If the claimant has paid the respondent's share of the adjudication fees in relation to the adjudication but has not been reimbursed by the respondent for that amount (the ***unpaid share***), the claimant may request the authorised nominating authority to specify the unpaid share in the adjudication certificate. If it is specified in the adjudication certificate, any such unpaid share is to be added to (and becomes part of) the adjudicated amount.

25 Filing of adjudication certificate as judgment debt

(1) An adjudication certificate may be filed as a judgment for a debt in any court of competent jurisdiction and is enforceable accordingly.

[...]

(4) If the respondent commences proceedings to have the judgment set aside, the respondent:

(a) is not, in those proceedings, entitled:

(i) to bring any cross-claim against the claimant, or

(ii) to raise any defence in relation to matters arising under the construction contract, or

(iii) to challenge the adjudicator's determination, and

(b) is required to pay into the court as security the unpaid portion of the adjudicated amount pending the final determination of those proceedings.

27 Claimant may suspend work

(1) A claimant may suspend the carrying out of construction work (or the supply of related goods and services) under a construction contract if at least 2 business days have passed since the claimant has caused notice of intention to do so to be given to the respondent under section 15, 16 or 24.

[...]

30 Protection from liability for adjudicators and authorised nominating authorities

(1) An adjudicator is not personally liable for anything done or omitted to be done in good faith:

(a) in exercising the adjudicator's functions under this Act, or

(b) in the reasonable belief that the thing was done in the exercise of the adjudicator's functions under this Act.

[...]

32 Effect of Part on civil proceedings

(1) Subject to section 34, nothing in this Part affects any right that a party to a construction contract:

(a) may have under the contract, or

(b) may have under Part 2 in respect of the contract, or

(c) may have apart from this Act in respect of anything done or omitted to be done under the contract.

(2) Nothing done under or for the purposes of this Part affects any civil proceedings arising under a construction contract, whether under this Part or otherwise, except as provided by subsection (3).

(3) In any proceedings before a court or tribunal in relation to any matter arising under a construction contract, the court or tribunal:

(a) must allow for any amount paid to a party to the contract under or for the purposes of this Part in any order or award it makes in those proceedings, and

(b) may make such orders as it considers appropriate for the restitution of any amount so paid, and such other orders as it considers appropriate, having regard to its decision in those proceedings.

34 No contracting out

(1) The provisions of this Act have effect despite any provision to the contrary in any contract.

(2) A provision of any agreement (whether in writing or not):

(a) under which the operation of this Act is, or is purported to be, excluded, modified or restricted (or that has the effect of excluding, modifying or restricting the operation of this Act), or

(b) that may reasonably be construed as an attempt to deter a person from taking action under this Act,

is void.